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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELIUT CRUZ, Defendant and Appellant.	B292139 (Los Angeles County Super. Ct. No. KA100986)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas C. Falls, Judge and Wade Olson, Judge. Affirmed.

Law Firm of Anish Vashistha, Anish Vashistha for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

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Eliut Cruz (defendant) filed a motion pursuant to Penal Code section 1473.7[1] to vacate his 2013 conviction for transporting marijuana on the grounds that his counsel (1) gave him incorrect advice about the immigration consequences of his plea, and (2) did not negotiate an immigration-neutral plea. The trial court denied the motion, concluding that counsel gave correct advice and negotiated a favorable plea. These conclusions were largely based on the court's credibility findings. Because we have no basis to disturb the court's findings and conclusions, we affirm the denial of defendant's motion.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Immigration status*

Defendant was born in Mexico, and emigrated to the United States at age three or four. He became a lawful permanent resident when he turned 18, on September 26, 2007.

B. *Underlying criminal acts*

In January 2013, defendant and a passenger were arrested in a car containing more than ten pounds of marijuana in suitcases as well as a loaded, semi-automatic firearm. Defendant was the driver.

C. *Prosecution, plea and sentence*

In the operative complaint, the People charged defendant with (1) selling, offering to sell, or transporting marijuana

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1 All further statutory references are to the Penal Code unless otherwise indicated.

(Health and Safety Code, § 11360, subd. (a)), and (2) possession of marijuana for sale (*id.*, § 11359).[2]

Defendant requested counsel, and was appointed an attorney from the Office of the Alternate Public Defender. By that time, that attorney (Counsel) had been working for 17 years in criminal defense and 13 years with the Office.

In April 2013, Counsel spoke with the prosecutor and negotiated a tentative plea deal. Pursuant to that deal, defendant would plead guilty to a single count of transporting marijuana and be sentenced to three years of formal probation and 180 days in jail; in exchange, the People would dismiss the remaining count against him. Counsel asked to continue the matter so that defendant could consult with an immigration attorney.

Defendant and Counsel met again before the continued hearing in May 2013. At that time, Counsel reviewed with Defendant the Felony Advisements of Rights, Waiver and Plea Form (Felony Plea Form or Form). Among other advisements, the Form states: "I understand that if I am not a citizen of the United States, I must expect my plea of guilty or no contest will result in my deportation, exclusion from admission or reentry into the United States, and denial of naturalization and amnesty." Defendant placed his initials next to that advisement.

During the plea colloquy, the trial court asked defendant whether he had "read over" and "discuss[ed]" the Form with his counsel, and whether he was "entering [his] plea freely and voluntarily." Defendant answered "yes" to both questions. The

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[2] The People charged the passenger with (1) possession of a controlled substance (*id.*, § 11350, subd. (a)), and (2) possession of a controlled substance with a firearm (*id.*, § 11370.1, subd. (a)).

court also advised defendant: "If you . . . are not a citizen of the United States, by pleading guilty you will be deported, you will be denied naturalization and you will be excluded from admission to the United States." In response to the court's question, defendant said he "underst[ood] [this] consequence[] of [his] plea[]." After these advisements, defendant entered a no contest plea to the transportation of marijuana count.

In June 2013, the court sentenced defendant to three years of formal probation, including 180 days of jail.

D. *Immigration proceedings*

The federal immigration authorities initiated removal proceedings against defendant in July 2013. The petition alleged that his transportation of marijuana conviction rendered him subject to removal because it was an aggravated felony (under 8 U.S.C. § 1227(a)(2)(A)(iii)) and a controlled substance offense (under 8 U.S.C. § 1227(a)(2)(B)(i)). The Immigration Judge ruled that defendant was subject to removal for having sustained a controlled substance offense and was ineligible for discretionary relief because he committed the instant offense within seven years of becoming a lawful permanent resident.

Defendant appealed the ruling, and was released from custody while the appeal was pending. While he was released, he married his U.S. citizen-girlfriend and had two children with her. After defendant's appeal was denied, he was deported to Mexico on January 30, 2018.

II. Procedural Background

A. *Defendant's motion to vacate*

In May 2018, defendant filed a motion to vacate his 2013 conviction under section 1473.7. He argued that he was entitled to relief because Counsel's performance in advising him to plead

guilty was constitutionally deficient in two ways: (1) Counsel gave him incorrect advice about the immigration consequences of his plea, and (2) Counsel did not try to negotiate a plea that would have no immigration consequences. In support of his motion, defendant filed two declarations from himself and a declaration from his wife along with several court documents. The People filed an opposition, and defendant filed a reply.

B. *Hearing*

On June 27, 2018, the trial court held a hearing on defendant's motion. In support of his motion, defendant called two witnesses—his wife and Counsel. (Defendant himself was not present because he had been deported.)

Defendant's wife testified that she had been present during all of the meetings defendant had with Counsel prior to his plea, and that Counsel had told defendant that (1) pleading to the transportation count would be "fine . . . immigration wise," a conclusion Counsel had verified by talking with his "buddies that are immigration attorneys," (2) it "wasn't necessary" for defendant himself to speak with an immigration lawyer, and (3) the Plea Waiver Form's advisement that defendant "will" be deported was "just, like, procedural" (and hence did not mean what it said). On cross-examination, she admitted that she was unable to remember the judge or the prosecutor from her husband's plea colloquy five years earlier, but could "remember every single word that [Counsel] told [defendant] when it came to specifically immigration consequences." She also stated that she would "do what it takes to get [defendant] back."

Counsel testified that he had no independent recollection of this case, but he brought his case file. The file contained his shorthand case notes, which read: "Δ's [defendant's] offer to

count 1 [the transportation count] / 180 [days County jail] . . . put case over so Δ could talk to an immigration attorney – [i]nformed Δ this can be deportable – Δ says his immigration [attorney] said it was okay to plead to transportation. Δ plead to transportation – Δ reviews waivers – informed of rights, obligations, consequences, and possible defenses. Δ wants to take deal." The file also contained an "immigration cheat sheet," dated January 2013, which indicated that transportation of marijuana was a deportable controlled substance offense. Based on these notes and his consistent practice in dealing with all clients, Counsel testified that he spoke with defendant about his immigration status, reviewed the Plea Waiver Form verbatim, including the advisement that defendant's plea "will result in . . . deportation" and asked that the court proceedings be continued so defendant could discuss the immigration consequences of his plea with an immigration attorney. Counsel explained that his notation that "this *can* be deportable" "may or may not be the exact words" he used to explain the immigration consequences to defendant. (Italics added.) Counsel further explained that he would never have told a client *not* to consult an immigration attorney, would never tell a client that the advisements in a Plea Waiver form were merely "procedural," and that he would never tell a client that he would consult with his "immigration buddies" because that is not a term he uses and because in 2013 he did not know any lawyers who practiced immigration law.

C. *Ruling*

The trial court denied the motion.

The court found Counsel to be credible, and defendant's wife not to be credible. Specifically, the court found that Counsel was too "meticulous," too "formal" and too much of a "stickler" to

tell a client to ignore the language in a Plea Waiver Form, to say he would "check with [his] buddies," or to tell a client not to consult an immigration expert.

Based in part on that finding, the court concluded that Counsel's representation of defendant was not deficient. More specifically, the court ruled that Counsel had given defendant "appropriate advice" about the immigration consequences of his plea because his notes "clearly indicated that [Counsel] . . . told the defendant that he was deportable" based on the "plea form" Counsel read to defendant. The court also ruled that Counsel had done "quite a bit of work" in "creative[ly] negotiat[ing]" a plea from an "original[] charge [of] possession of narcotics with a gun" down to a "pretty sweet deal" of a "probationary sentence" for mere transportation.

D. *Appeal*

Defendant timely appealed the denial of his motion.

DISCUSSION

Defendant argues that the trial court erred in denying his section 1473.7 motion.[3] Among other things, that section empowers a trial court to vacate a conviction as "legally invalid" if (1) the defendant was unable "to meaningfully understand . . . the actual or potential adverse immigration consequences of a plea"; and (2) the defendant's misunderstanding was prejudicial to his decision to enter the plea. (§ 1473.7, subd. (a)(1); *People v.*

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[3] Defendant also argues that the trial court erred in refusing, on hearsay grounds, to consider his declaration. Because the court made an alternative ruling based on the declaration's contents, we will review the court's alternative ruling. This obviates any need to reach this evidentiary challenge.

Camacho (2019) 32 Cal.App.5th 998, 1011-1012, (*Camacho*).) As the moving party, the defendant bears the burden of making this showing by a preponderance of the evidence. (§ 1473.7, subd. (e)(1); *Camacho*, at p. 1005.) A showing that defense counsel at the time of the plea was constitutionally ineffective will suffice, but is not necessary. (§ 1473.7, subd. (a)(1) ["A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."].)[4] We independently review a trial court's ultimate conclusion whether a conviction was "legally invalid," but review the court's subsidiary factual findings for substantial evidence. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)

As explained below, the trial court properly concluded that defendant's 2013 conviction was not legally invalid due to improper advice or the failure to negotiate an immigration-neutral plea.

I. Improper immigration advice

A defendant establishes that he did not "meaningfully understand" the "immigration consequences of a plea" if he demonstrates that the advice his attorney gave him about those consequences was "[in]accurate[]" or "'[in]correct.'" (*People v. Patterson* (2017) 2 Cal.5th 885, 898 (*Patterson*); *In re Hernandez* (2019) 33 Cal.App.5th 530, 544-545 (*Hernandez*).)

Defendant did not carry his burden of showing that Counsel gave him inaccurate or incorrect advice about the immigration consequences of his plea. It is undisputed that defendant's plea to the transportation of marijuana charge made

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[4] Although this specific language was not added until January 1, 2018 (Stats. 2018, ch. 825, § 2), it was merely "clarif[ying]" and hence applies retroactively to defendant's petition. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1006-1009.)

him subject to mandatory deportation. Substantial evidence supports the trial court's factual finding that Counsel "appropriate[ly] advi[sed]" defendant that a plea to this charge would result in his deportation. From his largely contemporaneous notes, Counsel testified that he asked defendant about his immigration status, discussed the immigration consequences of the People's plea offer, put the matter over to give defendant time to consult an immigration lawyer, and then reviewed the language in the Plea Waiver form specifying that defendant "must expect that [his] plea . . . *will result* in [his] deportation." Based on the court's assessment of Counsel's reputation for being a "stickler," the court credited Counsel's testimony that his notes accurately reflected what Counsel said and did. This showing is sufficient to establish that Counsel provided defendant accurate and correct advice about the immigration consequences of his plea. (E.g., *People v. Perez* (2018) 19 Cal.App.5th 818, 822, 829-830 [defense counsel reviewed plea waiver form specifying that deportation be mandatory; relief denied] (*Perez*); *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1114-1116 [same] (*Olvera*).)

Defendant resists this conclusion with what boil down to three arguments.

First, he argues an attorney gives incorrect advice when he says a plea presents merely a "potential" or "possibility" for deportation when, in fact, deportation is "virtually certain." (*United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 788; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 916-917 (*Espinoza*); *Patterson*, *supra*, 2 Cal.5th at p. 898; see generally *INS v. St. Cyr.* (2001) 533 U.S. 289, 325 ["There is a clear difference, for the purposes of retroactivity analysis, between

facing possible deportation and facing certain deportation."], superseded by statute on other grounds as stated in *Flores-Powell v. Chadbourne* (2010) 677 F.Supp.2d 455, 467.) Because Counsel's notes indicate that Counsel "informed defendant this [plea] *can* be deportable" (italics added), defendant reasons that Counsel merely told defendant that deportation was possible. Thus, defendant concludes, Counsel gave him inaccurate and incorrect advice because, as noted above, deportation was virtually certain to flow from his plea. This argument fails because its factual premise is invalid. Although Counsel's notes state that Counsel informed defendant that his plea "can" be deportable, counsel explained that his notes "may or may not be the exact words" he used. More to the point, Counsel went on to testify that he would not in his notes draw the fine distinction between "can" be deportable and "is" deportable that defendant now seeks to extrapolate from these notes. Given that Counsel in the same conversation also reviewed the Plea Waiver form informing defendant that deportation "will" occur, and that defendant expressed no confusion to Counsel or on the record during the plea about the immigration consequences of his plea, substantial evidence supports the trial court's finding that defendant was, in fact, consistently told by Counsel that he *would* be deported if he pled to the transportation count. (See *People v. Albillar* (2010) 51 Cal.4th 47, 60 [substantial evidence review obligates reviewing court to review the record in the light most favorable to the trial court's factual findings].)

Second, defendant contends that both he and his wife presented evidence—he by declaration, and she by testimony—that Counsel never properly informed him that his plea would result in his deportation. He also suggests that Counsel's notes

should be disbelieved. This contention invites us to come to a different credibility determination than the trial court, an invitation we must decline when reviewing solely for substantial evidence. (*People v. Tapia* (2018) 26 Cal.App.5th 942, 953 ["We do not reevaluate witness credibility."].) Here, the trial court found Counsel's testimony about the advice he gave to be credible, and defendant's wife's testimony to be "[un]belie[vable]." Although the court did not expressly make any findings about defendant's credibility, the account of events set forth in defendant's declaration and in his wife's testimony are almost identical; the court's finding that the latter is not credible applies with equal force to the former. (See *People v. Harris* (2015) 234 Cal.App.4th 671, 695 [reviewing court may not "disturb" the "implied credibility finding[s]" of the trial court].)

Lastly, defendant urges that three recent cases—*Camacho*, *supra*, 32 Cal.App.5th 998, *Espinoza*, *supra*, 27 Cal.App.5th 908, and *Hernandez*, *supra*, 33 Cal.App.5th 530—dictate a ruling in his favor. We disagree. *Camacho* held that a defendant was entitled to relief under section 1473.7 where his plea was certain to result in deportation, but his attorney advised him either that deportation "could" happen or that "everything would be fine." (*Camacho*, at pp. 1001, 1003, 1010.) *Espinoza* held that a defendant was entitled to relief under section 1473.7 when his plea was certain to result in deportation, but his attorney did not specifically discuss immigration consequences and at most reviewed a plea waiver form indicating that his plea "may" result in deportation. (*Espinoza*, at pp. 914-918.) Here, by contrast, Counsel gave defendant accurate and correct advice. *Hernandez* held that a defendant was entitled to relief pursuant to the writ of habeas corpus where her plea was certain to result in

deportation, but her attorney could not recall what he advised defendant and there was no evidence that the attorney followed any usual practice of reading the plea waiver form (which in that case recited that deportation was mandatory). (*Hernandez*, *supra*, at pp. 544-545.) Here, by contrast, Counsel not only testified to his usual practice, but that testimony was bolstered by his contemporaneous notes and by the trial court's specific finding regarding Counsel's credibility.

II. Failure to Negotiate an Immigration-Neutral Plea

A defendant may establish ineffective assistance of counsel entitling him to relief under section 1473.7 if he (1) "identif[ies] an[] . . . immigration-neutral disposition" was available, and (2) establishes that "the prosecution was willing to agree" to such a disposition. (*Olvera*, *supra*, 24 Cal.App.5th at p. 1118; *Perez*, *supra*, 19 Cal.App.5th at p. 830; *People v. Bautista* (2004) 115 Cal.App.4th 229, 240.)

Defendant did not carry his burden of showing either element necessary to establish relief under this theory.

He presented no admissible *evidence* of a possible immigration-neutral disposition. Instead, he offered (1) his opinion that a plea to transporting an "unspecified controlled substance" under Health and Safety Code section 11379 would be "'immigration-neutral,'" and (2) his current counsel's argument to that effect. Neither constitutes admissible evidence: Defendant presented no evidence that *he* is an expert in immigration law capable of offering an opinion regarding immigration-neutral dispositions, so the opinion in his declaration is necessarily hearsay because it originated with someone else and hence is inadmissible (Evid. Code, § 1200); and the argument of his counsel is, obviously, also not evidence (*People v. Kinder* (1954)

122 Cal.App.2d 457, 463). Even if we were to treat his counsel's argument as evidence, defendant has not established that pleading to Health and Safety Code section 11379 is an "immigration-neutral" disposition. Defendant cites *Ruiz-Vidal v. Gonzalez* (9th Cir. 2007) 473 F.3d 1072, 1074-1079, but that case holds only that an immigrant cannot be removed due to a conviction under Health and Safety Code section 11379 if nothing in the "record of conviction" shows that the controlled substance at issue qualifies as a controlled substance under federal immigration law. *Ruiz-Vidal* does not speak to whether the parties to the underlying criminal case may intentionally *hide the ball* from later scrutiny by immigration courts by omitting the otherwise qualifying controlled substance (here, marijuana) from the record of conviction. (8 U.S.C. § 1227(a)(2)(B)(i) [covering offense involving more than 30 grams of marijuana].)

Relatedly, defendant has offered no evidence whatsoever that the People would have agreed to a disposition that involved a concealment of the underlying facts. The People were certainly under no obligation to accept such a plea (see *People v. Halim* (2017) 14 Cal.App.5th 632, 648 [section 1016.3 requires prosecutors to "'consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor,'" but does not require avoidance to be dispositive]), and we question whether the People may ethically play *hide the ball* in any event.

Because defendant did not establish any misunderstanding of the immigration consequences of his plea or otherwise prove that his counsel was constitutionally ineffective, he necessarily failed to prove any prejudice. (*Tapia*, *supra*, 26 Cal.App.5th at p. 955.)

DISPOSITION

The order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ